No. 88-1469

Supreme Court, U.S.
FILED
MAR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DAVID AVALOS and SUSHI, INC., Petitioners

v.

GORDON THOMPSON, JR., PAUL HAMILTON and PHILIP WAGGONER, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Gregory Marshall
432 "F" Street, Suite 205
San Diego, California 92101
(619) 544-9501
Counsel of Record

Thomas F. Homann
432 "F" Street, Suite 204
San Diego, California 92101
(619) 239-0707

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Is the Chief Judge of a United States District Court entitled to qualified immunity from damages when, in the absence of a case or controversy, the judge summarily and without notice or hearing orders revocation of a properly issued permit for display of sculpture with a distinctly political message on federal property?

2. Is the Chief Judge of a federal court entitled to absolute immunity from declaratory and injunctive relief not affecting exercise of his Article III judicial powers over cases or controversies, solely on account of occupying an office equivalent in rank with the federal judge asked to grant the relief?

3. Does a United States Court of Appeals have discretion to refuse to hear and decide an appeal which is not jurisdictionally or practically defective by reason of procedural impropriety, mootness, abandonment, or any equivalent limitation?

TABLE OF CONTENTS

Questions Presented	(i)
Table of Contents	(iii)
Table of Authorities	(iv)
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 12

Bell v. Hood,
327 U.S. 678 (1946) 18

Bivens v. Six Unknown Federal Narcotics Agents,
403 U.S. 388 (1970) 3

Board of Regents v. Roth,
408 U.S. 564 (1972) 10

Carroll v. Princess Anne,
393 U.S. 175 (1968) 12

Colorado River Water Conservation District v.
United States, 424 U.S. 812 (1976) 20

Exhibitors Poster Exchange v. National Screen
Service Corp., 543 F.2d 1106 (5th Cir. 1976) 17

Flast v. Cohen,
392 U.S. 83 (1968) 17

Forrester v. White,
484 U.S. -- (1988) 8

Fort Wayne Books, Inc. v. Indiana, -- U.S. --
(Nos. 87-470 and 87-614) (Feb. 21, 1989) 12

Frazier v. Heebe,
482 U.S. -- (1987) 17

Freedman v. Maryland,
380 U.S. 51 (1965) 12

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 8

Hodel v. Virginia Surface Min. and Recl. Assn.,
452 U.S. 264 (1981) 10

In re Rini,
782 F.2d 603 (6th Cir. 1986) 17

Lindsey v. Normet,
405 U.S. 56 (1972) 20

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 9, 10

Matthews v. Eldridge,
424 U.S. 319 (1976) 10

Monell v. New York City Dept. of Social Services,
436 U.S. 658 (1978) 10

Near v. Minnesota,
283 U.S. 697 (1931) 12

Nebraska Press Association v. Stuart,
427 U.S. 539 (1976) 12

New York Times Co. v. United States,
403 U.S. 713 (1971) 12

Parratt v. Taylor,
451 U.S. 527 (1981) 10

Pulliam v. Allen,
466 U.S. 522 (1984) 16

Rizzo v. Goode,
432 U.S. 362 (1976) 10

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975) 12

Taylor v. McKeithen,
407 U.S. 191 (1972) 20

United States v. Eight Thousand Eight Hundred
Fifty Dollars, 461 U.S. 555 (1983) 10

United States v. Grace,
461 U.S. 171 (1983) 11

United States v. Thirty-Seven Photographs,
402 U.S. 363 (1971) 12

Wooten v. Bomar,
266 F.2d 27 (6th Cir. 1959) 17

Constitution, Statutes, Regulations:

United States Constitution

Article III	2, 3, 16, 17, 18
Fifth Amendment	3, 10, 15
First Amendment	3, 11, 15

United States Code

28 U. S. C. 1254(1)	2
28 U. S. C. 1291	3, 17
28 U. S. C. 1292	17
28 U. S. C. 1331	3
28 U. S. C. 2101(c)	2
40 U. S. C. 285	12
40 U. S. C. 490 (a)	14

Code of Federal Regulations

41 C. F. R. 101-20.701	14
41 C. F. R. 101-20.702	14
41 C. F. R. 101-20.703	9, 14

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DAVID AVALOS and SUSHI, INC., Petitioners

v.

GORDON THOMPSON, JR., PAUL HAMILTON and PHILIP WAGGONER, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners David Avalos and Sushi, Incorporated respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

---

1 No parties not listed in the caption of this petition were named or appeared in the case below except for the United States General Services Administration.

OPINIONS BELOW

The judgment (order dismissing appeal) of the Court of Appeals was not published; it is reprinted in the Appendix hereto at page A-1. The order of the Court of Appeals denying a petition for rehearing and suggestion for rehearing en banc was not published; it is reprinted in the Appendix hereto at page A-2.

The memorandum opinion of the United States District Court for the Southern District of California from which the appeal was taken was not published; it is reprinted in the Appendix hereto as pages A-3 through A-29.

JURISDICTION

The judgment (order dismissing appeal) of the Court of Appeals was entered August 12, 1988 and the order denying the timely petition for rehearing and suggestion for rehearing en banc was entered December 7, 1988; this petition for writ of certiorari is timely pursuant to 28 U. S. C. 2101(c) and Rule 20.4, Rules of the Supreme Court of the United States.

Certiorari jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, section 2: "The judicial Power shall extend to all Cases, in Law and Equity . . . "

United States Constitution, First Amendment: "Congress shall make no law . . . abridging the freedom of speech . . ."

United States Constitution, Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

The District Court granted summary judgment in favor of defendants in a *Bivens* action[2] on the grounds of immunity. The Court of Appeal dismissed an appeal of the judgment in a decision which provided in its entirety:

"The appeal is dismissed without prejudice."

District Court jurisdiction was grounded on 28 U. S. C. 1331 and the Court of Appeals' jurisdiction was based on 28 U. S. C. 1291.

Petitioners David Avalos and Sushi, Inc. are a widely respected artist and art gallery. In late 1985 Sushi conceived an art show featuring art outside the

---

2 *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1970).

gallery in public places. As part of that show, petitioners wished to display in the plaza of the downtown San Diego, California federal building, an artwork entitled the *San Diego Donkey Cart* consisting of a full-scale, painted wood construction by Avalos modeled after the tourist-attraction donkey carts common in the streets of Tijuana, B. C., Mexico near San Diego.

Petitioners made inquires and were advised they would need to secure a permit from the General Services Administration (G. S. A.) to display the sculpture. They contacted the local G. S. A. and submitted an application for a permit to place the art work for two weeks (January 4 - 17, 1986) at a location some 84 feet east of the doorway of the courthouse wing of the federal building and some 34 feet west of the public sidewalk where it would not interfere with ingress or egress. The permit was granted.

On Sunday, January 5, 1986, Avalos installed *San Diego Donkey Cart* at the designated location. The next day, Chief Judge Gordon Thompson, Jr. of the United States District Court for the Southern District of California issued a written order on United States District Court memorandum stationery addressed to Paul Hamilton, the local G. S. A. buildings manager, ordering:

> "For security reasons you are hereby directed forthwith to cause the removal of the structure standing in front of the United States Courthouse."

The order was signed: "Gordon Thompson, Jr., Chief Judge, United States District Court." Hamilton believed this was an order of the Court; in fact, the directive had been communicated orally at first and he requested that it be put in the form of a written court order. Considering himself compelled by judicial power of the United States, Hamilton removed the art work and revoked the permit.

Four days later on January 10, 1986, petitioners filed a complaint against Judge Thompson, G. S. A. officials and the G. S. A. seeking injunctive and declaratory relief and damages and requesting immediate relief by temporary restraining order. Judges in the Southern District of California deemed themselves disqualified and refused to consider the temporary restraining order application. The application was never heard and therefore the original permit period passed without the art work being displayed.[3]

The case proceeded before Judge Harry L. Hupp of the Central District of California as a Southern District case. The defendants moved for dismissal or summary judgment. The District Court granted summary judgment in favor of the individuals on the ground they were entitled to immunity, certifying the decision as final and appealable under Rule 54(b) of the Federal Rules of Civil Procedure. The case against the G. S. A.

---

3 Petitioners sought an order from the Court of appeals for the Ninth Circuit directing the Southern District to hear the temporary restraining order application but that application was denied on January 15, 1986. (Ninth Circuit case number 86-7016.)

under the Administrative Procedure Act was allowed to proceed.[4]

Petitioners timely appealed the summary judgment and the appeal was fully briefed. During the oral argument, the Court of Appeals inquired about the status of the case against the G. S. A. The panel then conferred in chambers and returned to the bench to announce that argument would be stayed until the District Court reached a final decision in the case against the G. S. A.

After a decision in the case against the G. S. A. was rendered, instead of rescheduling argument and proceeding to decide the appeal, the Ninth Circuit panel issued an order which read in its entirety:

"The appeal is dismissed without prejudice." A-1.

Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc noting two points: (1) the dismissal operated as a final disposition of the issues in the case, notwithstanding the proviso "without prejudice," and (2) neither the doctrine of mootness nor any other of the traditional exceptions to the rule requiring a decision on the merits was present.

The petition for rehearing was denied and the suggestion for rehearing en banc was rejected.

---

4 Ultimately the District Court reviewed the G. S. A. proceedings and set aside the G. S. A.'s revocation of the permit. That decision was not involved in the Ninth Circuit appeal nor is it involved in this certiorari petition.

REASONS FOR GRANTING THE WRIT

Is the Chief Judge of a United States District Court entitled to qualified immunity from damages when, in the absence of a case or controversy, the judge summarily and without notice or hearing orders revocation of a properly issued permit for display of sculpture with a distinctly political message on federal property?

If it is assumed the law of immunity of judges does not vary according to whether the judge in question is a state judge or a federal judge, the law to apply in this case would be so well settled that the case would not be deserving of this Court's attention, even though the case was obviously wrongly decided under that law.

However, this petition should be granted since the pertinent cases on point have all involved state judges while this case involves a federal judge. The refusal of the Court of Appeals even to decide this case, combined with the obvious error of the decision of the District Court, reveals the existence of a de facto gloss on the doctrine of judicial immunity, a gloss which holds that the immunity of a federal judge is much broader than that of a state judge. It appears to be so broad as to extend beyond absolute immunity from liability even for actions not taken in a judicial capacity, to encompass immunity even from the formalities of judicial review.

The result is an intolerable diminution of the rights of citizens who have the misfortune not only of

suffering constitutional injuries, but of suffering those injuries at the hands of a United States judge whose conduct is exempt from remedy or even review in the federal courts.

Surely this is not a phenomenon that does or will occur frequently. But just as surely it is one which will occur predictably and occasionally until the end of the Republic. Each time it occurs, the axiom central to the American way of life, that no man is above the law, is sorely tested.

In sum, it is crucially important for this Court, now presented with a case testing the axiom directly and precisely, to decide whether the status of United States Judge insulates an individual from damages for harms he inflicts well outside the scope of any case or controversy.

The District Court correctly decided that Chief Judge Thompson's action should be analyzed under the doctrine of qualified not absolute immunity since his actions were taken in an administrative capacity, not as a judge adjudicating a case or controversy. A-10 through A-14; *see Forrester v. White*, 484 U.S. -- (1988). Under the qualified immunity doctrine, government officials escape liability for damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). But the District Court failed to evaluate with any care whether the law Chief Judge Thompson violated was "clearly established" and the Court of Appeals refused to examine Chief Judge Thompson's conduct at all.

In several respects, the law Chief Judge Thompson violated was "clearly established" and a reasonable judge should have known as much.

Nothing could be more "clearly established" than that a person may not be deprived of liberty or property without due process of law and these requirements of due process take on heightened importance when core First Amendment free speech rights are at stake. Clearly established, basic procedural formalities were not observed in this case.

Clearly the permit issued to Avalos and Sushi was a property right. Congress established a public forum by creating a method for allowing use of federal property for the display of art. Petitioners fulfilled all the conditions precedent for entitlement to use the public forum subject to revocation only "for cause." Cf. 41 C. F. R. 101-20.703 (cause related grounds for revocation of Public Buildings Cooperative Use Act permit).

Petitioners' property right to use the public forum was revoked without the rudiments of due process, notice and an opportunity to be heard.

There is nothing about notice to petitioners in Chief Judge Thompson's order of January 6, 1986. Parallel to the absence of notice is the plain implication there was never any thought of a hearing, even though "some form of a hearing is required before the owner is finally deprived of a protected property interest." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

This Court's cases reveal that under the Fifth Amendment the issue is not *whether* there should be a hearing but *when* it should be -- before the property interest is taken or afterward. See, e. g. *United States v. Eight Thousand Eight Hundred Fifty Dollars*, 461 U.S. 555 (1983); *Logan v. Zimmerman Brush Co.*, *supra*, 455 U.S. 422; *Hodel v. Virginia Surface Min. and Recl. Assn.*, 452 U.S. 264 (1981); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

The District Court's opinion which the Court of Appeals refused to review did not address petitioners' due process rights at all. Instead, the District Court took the view, see A-20, that nothing Chief Judge Thompson did implicated petitioners' rights; rather, Chief Judge Thompson only ordered lesser officials to affect petitioner's rights and it was only the lesser officials whose actions reached the threshold of the Fifth Amendment.

This argument is at best facetious. It is clearly established, as logic would dictate, that a person is potentially liable for a constitutional tort so long as he or she is *causally linked* to the harm; a showing that the defendant personally inflicted the harm is not required. See, e. g., *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-691 (1978); *Rizzo v. Goode*, 432 U.S. 362, 373-375 (1976). If the District Court's view were the rule, individual constitutional rights would soon be of little value.

Further, the First Amendment interests at stake demanded heightened and stricter due process requirements than normal. The law of First Amendment due process is clearly established in a legion of well-known cases involving prior restraints of speech.

The art work Chief Judge Thompson ordered not to be exhibited was a sculpture with a distinctly political message. The tourist attractions it parodied involve the seating of American tourists on the bench of a donkey cart that is gaily painted in a Mexican fashion. The tourists don large sombreros bearing lighthearted inscriptions (e. g., "Drunk Again!"), and pose for photographs that are presumably used like postcards or as mementoes of the tourist's visit to the border city of Tijuana.

Avalos' work was a full-size cart that featured, where the observer would expect to see the tourists, a plywood cutout of two figures -- a simply-dressed Mexican peasant with his arms upraised and, behind him, a U.S. Border Patrol officer frisking the captive peasant. There is another figure in the scene, a homeless person sleeping in a doorway. The artist's intent was to express the irony of the gay facade which contrasts against the gritty realities of the culture of the U.S.-Mexican border today.

The District Court in its opinion only dealt in passing with the First Amendment issues, noting *United States v. Grace*, 461 U.S. 171 (1983), a case which fully supports petitioners here. The District Court attempted to distinguish *Grace* by treating this case as though the art work had been installed *in* a courthouse,

not well outside at a location which surely could not be denied the status of public forum.

The District Court failed entirely to discuss the large body of law on prior restraints, even though Chief Judge Thompson's action ordering removal of the art work was a classic prior restraint of expression. The procedural requirements for imposition of a prior restraint by denial of a license and by court order are as clearly established as any doctrine this Court has ever pronounced. E. g. *Fort Wayne Books, Inc. v. Indiana*, -- U.S. -- (Nos. 87-470 and 87-614) (Feb. 21, 1989); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 374 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968); *Freedman v. Maryland*, 380 U.S. 51, 58-59 1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931).

Finally, in finding Chief Judge Thompson immune the District court overlooked "clearly established" statute and regulatory law which the Chief Judge violated.

A clearly established Act of Congress, signed into law by the President, 40 U. S. C. 285, provides:

> "All courthouses . . . together with the site or sites thereof, are hereby expressly declared to be under the exclusive jurisdiction

> and control and in the custody of the Administrator of General Services . . . "

The other two branches of government have troubled themselves to include the word "exclusive" in a statute that would imply the same thing without that word--to make it unmistakably clear it is G. S. A., and no one or no other agency, that has "jurisdiction and control and . . . custody" of courthouse sites.[5]

The district court reasoned that this law cannot deny United States Judges some "say," or "interest," (A-20) in courthouse security. But there is no issue in this case of the judges' interest or say in security matters. Judges should have some important say about security issues at the courthouse. But this case is not about a Chief Judge's "say"; it is about his assertion of authority unilaterally and without notice or hearing to revoke a duly issued permit, in the absence of a case or controversy, on nothing more than speculation that public safety near the courthouse might at some future time be affected in some remote way.

---

5 This instant case does not involve the inside of a court*room*, or the area immediately outside it, where the coverage of section 285 might be considered deeply problematic. This case involves a "site" outside of, indeed some 84 feet removed from, the court*house* building. Additionally, note that for the limited purposes of the inquiry regarding immunity -- a search only for what the clearly established law is -- it cannot be maintained section 285 is not clear or established. It could be argued to be wrong, but that would make it no less clear.

Additionally, Chief Judge Thompson utterly ignored a statutory and regulatory scheme set forth in the U.S. Code and the Code of Federal Regulations, the clearly established law of the Public Buildings Cooperative Use Act which was surely violated by Chief Judge Thompson's order.

The Act itself provides that the G. S. A., an Executive Branch agency, and not any Judicial Branch person or entity, is empowered to administer the Act and to issue permits under it. See generally, 40 U. S. C. 490 (a). Consistently, the regulations under the Act provide that the G. S. A. buildings manager is empowered to approve, disapprove, or cancel permits. 41 C. F. R. secs. 101-20.701 (c); 101-20.702 (a), (e), (f); 101-20.703.

Moreover, the regulations provide for cancellation of permits on one or more of ten specific grounds, *id.*, sec. 101-20.703 (a) (1) through (a) (10), none of which even arguably include the kinds of threats that might be encompassed in the "security reasons" that were the sole rationale stated by Chief Judge Thompson.

In sum, Chief Judge Thompson stepped in and cancelled the permit even though sole power to do so was vested in another official, and even though the law setting forth grounds for such cancellations did not include the ground on which he relied. It could not be more clearly established that in doing so he violated the law.

To summarize, Chief Judge Thompson was held immune even though he violated clearly established law in three different ways. He revoked petitioners'

property right in the use of a public forum, without a semblance of a hearing, in violation of the Fifth Amendment due process clause. He imposed a prior restraint on protected, political speech, without a hearing or any of the other procedural formalities required by the First Amendment. And he took this action in the face of a statutory and regulatory scheme vesting exclusive jurisdiction to do so in another government official employed by another branch of the government.

Petitioners' case is made compelling by the fact the respondent is the Chief Judge of a United States District Court. This case clearly presents the question whether a Chief Judge, by virtue of his office, is situated above the law.

Is the Chief Judge of a federal court entitled to absolute immunity from declaratory and injunctive relief not affecting exercise of his Article III judicial powers over cases or controversies, solely on account of occupying an office equivalent in rank with the federal judge asked to grant the relief?

The clearest illustration that the courts below created in this case a de facto rule rendering the law of immunity as it applies to United States judges much more expansive than the law of immunity as it has been declared by this Court with regard to state judges is the finding by the District Court, upheld by the Court of Appeals, that Chief Judge Thompson is immune from injunctive and declaratory relief.

With regard to state judges this court held directly to the contrary not long ago. *Pulliam v. Allen*, 466 U.S. 522, 541-542 (1984); see also *id.*, at 544 (Powell, J., dissenting, noting the holding extends to declaratory relief). And in this case the District Court acknowledged the existence of this rule. A-10.

Yet the District Court proceeded to decide Chief Judge Thompson *is* immune from declaratory and injunctive relief. The District Court held it lacked power to issue an injunction against Chief Judge Thompson, A-21 through A-22, and without mentioning petitioners' separate claim for declaratory relief, held no remedy at all was available.

The District Court expressed the thought that "[petitioners have] cited the court no authority," A-21, and "[t]his Court knows of no authority," to the contrary. A-22. These statements and the court's grant of summary judgment reveal that the District Court concluded not only that *Pulliam v. Allen* applies only to state judges, but also that when it comes to United States judges the converse rule operates: United States judges are presumptively immune from injunctive and declaratory relief.

It appears the District Court believed it could not exercise its Article III judicial powers to control the exercise by another United States judge of his own Article III judicial powers. A-22. Yet the key fact in this case is that Chief Judge Thompson's action was *not* an exercise of Article III judicial powers. The District Court had acknowledged this earlier in its opinion. A-11 through A-14.

Article III of the Constitution delineates the *nature* of the judicial power by only that vague term: "judicial power." With one minor exception the only clear limitations expressed in the Constitution have to do with the *circumstances* in which that vague power is exercised: "cases, in law and equity"; "cases"; "cases"; "controversies"; "controversies"; "cases"; "cases"; "trial"; "cases"; "trial"; "trial"; "open court." (The exception is in the second paragraph of Section 3, implying that judicial power includes the power of "conviction.")

It cannot be contended any of these *circumstances* even arguably existed in the case of petitioners' art work and permit as of the time Chief Judge Thompson intervened. There was no "case" or "controversy" or "trial" or "open court." See generally *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

Moreover, there was no alternative forum for petitioners. Despite a suggestion to the contrary by the District Court, A-22, neither this Court nor the Circuit Court of Appeals would have had jurisdiction over the dispute. U.S. Constitution, Article III, section 2, paragraph 2; 28 U.S. Code sections 1291, 1292; *Frazier v. Heebe*, 482 U.S. -- (1987); *In re Rini*, 782 F.2d 603 (6th Cir. 1986); *Exhibitors Poster Exchange v. National Screen Service Corp.*, 543 F.2d 1106 (5th Cir. 1976), cert. den. 431 U.S. 938; *Wooten v. Bomar*, 266 F.2d 27, 28 (6th Cir. 1959), cert. den. 361 U.S. 888.

If no remedy could be afforded by the District Court in this case, then Chief Judge Thompson was

absolutely immune to a degree not heretofore contemplated for any official.

Petitioners contend the rule must be that when a United States Judge exercises administrative powers outside the confines of a case or controversy, in those limited circumstances he or she *is* subject or subordinate to the remedial Article III powers of another United States Judge exercised in a case filed by a subject of the first judge's actions.

In fact, petitioners contend, such a rule is constitutionally mandated. Otherwise there would be no way for parties in petitioners' position to get the protection guaranteed in Article III, section 2, paragraph 1: "The judicial power shall extend to *all* cases . . . arising under this Constitution [or] the laws of the United States . . .."

The alternative, necessarily, would be intolerable -- a holding that although petitioners were wronged, the courts are powerless to grant them relief. Cf. *Bell v. Hood*, 327 U.S. 678, 684 (1946).

In addition, the reservations the District Court expressed about injunctive relief, whether right or wrong, simply would not apply to declaratory relief. It is only a passive declaration, not an affirmative order. Yet the courts below have held, without any discussion of the issue, that petitioners must be denied declaratory relief as well.

To repeat a point made above, petitioners freely acknowledge that this is a kind of dispute that does not and will not arise very often. But it will arise,

predictably. Only this Court can finally decide what rules shall apply to the resolution of such disputes. That decision will be of profound Constitutional significance.

For this reason, the petition should be granted and the important question of the amenability of United States Judges to injunctive and declaratory relief decided.

Does a United States Court of Appeals have discretion to refuse to hear and decide an appeal which is not jurisdictionally or practically defective by reason of procedural impropriety, mootness, abandonment, or any equivalent limitation?

As it stood before the Court of Appeals this case suffered from no procedural infirmity. It was not moot, abated, or otherwise unentitled to adjudication. Yet the Court of Appeals elected not to decide the case, an election which had the effect of affirming the judgment against petitioners without any statement of reasons or analysis of law -- indeed, without formally even deciding the case.[6]

---

6 No reason was given for the Court of Appeals' decision to dismiss the case "without prejudice." Insofar as relief against Chief Judge Thompson is concerned, the "without prejudice" proviso is mysterious. The decision appealed from was a final, conclusive resolution of the parties' rights, and accordingly, dismissal of the appeal had final and conclusive effect.

Thus, the case presents this Court with a rare opportunity to decide the fundamental and vitally important question of whether a United States Court of Appeals has the discretion to refuse to decide an appeal that is legally entitled to adjudication, as well as the related question of the degree to which it must, in deciding a case, provide a statement of reasons and analysis of legal issues presented.

It appears these questions have not been very fully explored to date. See, e.g., *Colorado River Water Conservation District v. United States*, 424 U.S. 812, 817-818 (1976); *Taylor v. McKeithen*, 407 U.S. 191 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); Commission on Revision of the Federal Court Appellate System, Structure, and Internal Procedures: Recommendations for Change (Final Report) (1975), p. 50 (cited at 9 Moore's Federal Practice, section 236.02, p. 36-3 (fn. 3)).

Certiorari should be granted to determine whether a Court of Appeals has discretion to refuse to decide cases properly before it.

CONCLUSION

For the foregoing reasons, petitioners submit this case is one well worth this Court's consideration. Petitioners pray the Court grant the writ of certiorari.

Respectfully submitted,

GREGORY MARSHALL

THOMAS F. HOMANN

Attorneys for Petitioners

March, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 87-5939

David Avalos and Sushi, Inc.,
Plaintiffs,

v.

General Services Administration,
Hon. Gordon R. Thompson, Jr.,
Paul Hamilton, and Philip Waggoner,
Defendants.

ORDER
Filed August 12, 1988

Before: FARRIS, NORRIS, and REINHARDT, Circuit Judges

The appeal is dismissed without prejudice.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 87-5939

David Avalos and Sushi, Inc.,
Plaintiffs,

v.

General Services Administration, et al.,
Defendants.

ORDER
Filed December 7, 1988

Before: FARRIS, NORRIS, and REINHARDT, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
Case No. CV 86 - 0043 (HLH)

David Avalos and Sushi, Inc.,
Plaintiffs,

v.

General Services Administration,
Hon. Gordon R. Thompson, Jr.,
Paul Hamilton, and Philip Waggoner,
Defendants.

MEMORANDUM IN RE MOTIONS FOR
SUMMARY JUDGMENT
Filed April 16, 1987

In this matter, motions to dismiss and motions for summary judgment on behalf of all defendants were previously submitted. The matter will be treated as a motion for summary judgment under Rule 56. The motions for summary judgment are granted at to defendants Hon. Gordon Thompson, Jr., Paul Hamilton, and Philip Waggoner. The motions are denied as to defendant General Services Administration (GSA).

The matter is treated as a motion for summary judgment because certain undisputed facts appear in the affidavits and declarations of the parties. The Court

has taken as true for the purposes of this motion those allegations of the complaint which have not been disputed in the declarations, as well as the undisputed portions of the declarations of the parties.

1. *The facts*. The facts set forth herein below are without substantial controversy. Plaintiff, David Avalos, is an artist who has created artworks, including the one at question in this lawsuit, which contain expressions regarding the situation of alien Mexican laborers in this country. The other plaintiff, Sushi, Inc., whose status in this lawsuit is somewhat vague but not addressed on these motions, sponsored a showing of "street art" in the city of San Diego in January 1986. Congress has enacted authorization for certain use by the public of federal buildings and grounds. (Public Buildings Cooperative Use Act of 1976, P.L. 94-541; hereafter PBCUA.) General Services Administration, whose duties include management of federal buildings, has adopted regulations under PBCUA allowing the "occasional use" of public areas in public buildings and grounds for "cultural, educational, and recreational activities." Pursuant to those regulations, GSA has developed a permit application process. Avalos through an agent applied for a permit to display his work "San Diego Donkey Cart" (hereinafter referred to as "the work" or "the work of art") in an open area on Courthouse grounds immediately outside the front door to the Federal Courthouse in San Diego. The application contained a picture of a model of the proposed work of art. The work purportedly depicted a San Diego version of a "Tijuana donkey cart" (apparently a common tourist attraction in Tijuana, consisting of a small cart pulled by a donkey in which the tourists may ride.) Avalos' work depicted a Latino

on the donkey cart being frisked by a man in the uniform of a Border Patrol agent. For purposes of the motion for summary judgment, it is uncontradicted that when Avalos' agent applied for the permit, the clerical employee of the GSA receiving the permit inquired as to what precautions there were to prevent children and others climbing over the display. Avalos' agent states that the clerical employee suggested a fence or some other device to protect the display. When this matter was reported to Avalos, he agreed that such would be appropriate, expressing the thought that such a fence was in consonance with the artistic message intended to be conveyed. Accordingly, when erected, the representation of the "San Diego donkey cart" was surrounded by a stout fence consisting of wooden posts, chain link, and barbed wire, securely enclosing the work. The application, however, was never amended to show the existence of the fence, its appearance, or its construction. The permit was duly issued by GSA for the period January 4, 1986, to January 17, 1986. Avalos' work of art was installed on January 5, 1986. The next morning, January 6, 1986, the defendant, Gordon Thompson, Jr., a judge of the United States District Court for the Southern District of California, and Chief Judge of that district, was approached by a building guard. The record does not reveal whether the guard was an employee of the Federal Protective Service (the security arm of the GSA) or of the United States Marshal (the security arm of the Federal District Court). The building guard advised Chief Judge Thompson that in the opinion of the security staff the artwork constituted a security hazard. The building guard reported that the structure could not be routinely inspected and that the wire and wood fence prevented the guard from making close inspections for any

explosive device or other dangerous material. During the noon hour, Chief Judge Thompson conferred with the other judges of the court. The judges agreed that the structure constituted a security threat. At approximately 3 p.m. on January 6, Chief Judge Thompson informed defendant Paul Hamilton, GSA's manager of the courthouse building, of the position of the court and specifically requested that the sculpture be removed because of the perceived security threat. Mr. Hamilton requested that Chief Judge Thompson confirm this position in writing. Chief Judge Thompson then wrote a memo to Mr. Hamilton the text of which stated as follows:

> "For security reasons you are hereby directed forthwith to cause the removal of the structure standing in front of the United States Courthouse."

The memorandum was signed by Chief Judge Thompson. Mr. Hamilton orally advised Mr. Avalos that Chief Judge Thompson had directed removal of the artwork.

Following Mr. Hamilton's phone call to Mr. Avalos on January 6, a letter was delivered to Mr. Avalos dated that same day which reads in part:

> "The permit for use of space in public buildings and grounds issued to you on December 10, 1985, is hereby revoked. Please have the piece removed not later than 8 p.m. this date.
>
> This action is taken based on the provisions of Federal Property Management Regulations,

Title 41, Code of Federal Regulations, Chapter 101, paragraph 101-20.7 and considerations for the security of the building and its occupants."

Mr. Avalos did not remove the artwork. Thereafter, employees of GSA removed the artwork and stored it until picked up by Mr. Avalos.

Mr. Avalos consulted the American Civil Liberties Union, whose attorney represents Mr. Avalos in this lawsuit. This lawsuit was initially filed on January 10, 1986. A First Amended Complaint was filed on March 3, 1986. (The First Amended Complaint contains allegations of facts occurring after January 10, and to that extent should have been denominated a "First Amended and Supplemental Complaint." The Court so considers it.) In the meantime, Mr. Avalos pursued administrative remedies under the GSA regulations. The regulations (41 C.F.R. 101-20.7, et. seq., of the Federal Property Management Regulations) provide the grounds for disapproval of or cancellation of a permit. Section 101-20.704, provides for a type of "appeal" from a cancellation of a permit. The appeal allowed is not a full due process type administrative hearing, but instead consists of an application for review to the GSA "regional officer" (the immediate supervisor of the building manager), who shall conduct an informal review, including hearing from both the building manager and from the appellant and shall render a decision. A decision is to be rendered within ten days of the time the appeal is received by the regional officer. The regional officer reviewing Mr. Avalos' appeals was defendant Philip Waggoner, whose official

title is "Director of Buildings Management Division, Region 9 of the General Services Administration."

The filing of this lawsuit on January 10, 1986, coincided with the filing of the administrative appeal. In his handling of the appeal, Mr. Waggoner consulted with Mr. Hamilton. He also inquired of Mr. Avalos if Mr. Avalos wanted to submit any further material beyond his letter of January 10. Mr. Avalos replied that he wished to submit no further material. On January 23, 1986, Mr. Waggoner denied the appeal. He stated first that the appeal was moot, as the permit expired on January 17, 1986. He also stated as an alternative ground as follows:

> "Secondly, when the permit was issued, your display was understood to be open. However, when erected, unlike photographs supplied with your application, your display was enclosed completely by a fence approximately 8' by 10' and made up of two-by-fours, barbed wires, and chain link fence. Thus, your display varied from your application."

Thereafter, as set forth above, the complaint was amended to include an action for court review under the Administrative Procedure Act.

As to the motivation of the parties, there is a dispute of fact. Chief Judge Thompson, in his declaration, states that he was motivated by security considerations only, and his action was not based on any personal feelings about the artwork or its expressive content. Mr. Avalos recites inadmissible hearsay statements to the contrary. There has been no

discovery on the question of motivation. To the extent that the motivations of the parties are relevant, therefore, this motion for summary judgment could not be granted without an opportunity for discovery. However, as set forth below, motivation is not an element in the Court's determination that summary judgment should properly be granted to the defendants Thompson, Hamilton, and Waggoner.

Plaintiffs' complaint, although expressed on different legal theories, proceeds on the basic contention that the removal of the artwork violated the First Amendment rights of the plaintiffs. Plaintiffs seek both injunction and damages. The plaintiffs assert that damages are sought only as an alternative remedy. The action is posited in the nature of a "*Bivens*" action to redress allegedly unconstitutional actions taken by federal officials. The complaint also alleges that the action taken violated plaintiffs' rights under the "Public Buildings Cooperative Use Act" and its regulations, that there was no legal basis for the cancellation of the permit, and that the regulations, if they allow cancellation on security grounds, are invalid. Thus, plaintiffs proceed under two basic legal theories: 1) A cause of action on a constitutional tort for alleged violation of the plaintiffs' constitutional rights, seeking both injunction and damages, and 2) for an Administrative Procedure Act review of the administrative action taken by GSA. The motions for summary judgment claim both absolute and qualified immunity on behalf of the individual defendants, and as to GSA claims that under the undisputed facts there is no ground for setting aside the administrative decision. These matters will be discussed separately below.

2. *The motions as to Chief Judge Thompson.* For the reasons set forth above, the matter is treated as a motion for summary judgment. This section of this memorandum will discuss the damage action as to Chief Judge Thompson in two aspects: The claim of absolute immunity, and the claim of qualified immunity. Thereafter will be discussed the injunction action as it pertains to Chief Judge Thompson.

a. *The claim of absolute judicial immunity must be rejected.* In his motion, Chief Judge Thompson claims the benefit of the absolute immunity doctrine for judicial acts. The doctrine is expressed in cases such as *Stump vs. Sparkman*, (1978) 435 U.S. 349, 359, 55 L.Ed.2d 331, 341, 98 S.Ct. 1099, 1106, as follows:

> "A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."

The immunity is founded upon the general proposition that a judicial officer, in performing his duties, should be free to act on his perception of the steps that need to be taken, without fear of personal consequences. (See, e.g., *Bradley vs. Fisher*, (1871) 80 U.S. 335, 347, 20 L.Ed. 646, 649.) The immunity is one to be free of damage claims, and does not extend to injunction claims. *Pulliam vs. Allen*, (1984) 466 U.S. 522, 80 L.Ed.2d 565, 104 S.Ct. 1970.

The *Stump* case makes it clear that actions taken by a judge in a judicial proceeding are clothed with absolute immunity. The judge must be acting in a judicial capacity. (*Dennis vs. Sparks* (1980) 449 U.S.

24, 101 S.Ct. 183, 66 L.Ed.2d 185.) The question here is how this principle applies to an action of an administrative character, not taken in the context of a particular legal proceeding. Care must be taken to distinguish the concept of "judicial action" and "judicial proceeding." For a judicial action taken in a judicial proceeding, the principle of *Stump*, *Dennis*, and other cases clearly applies; there is absolute immunity whether the action taken is wrong, wholly wrong, or egregiously wrong. When the action, however, is judicial, but not taken in judicial proceedings, other considerations arise. The cases are far sparser in this situation. Judges, of course, have certain administrative duties. A Chief Judge in the federal system has numerous administrative duties. The performance of the administrative duties are taken to permit the operation of the court system, so that individual cases may be adjudicated, and in this sense are judicial actions. Not all of such judicial actions, however, receive the protection of the absolute immunity doctrine. An early example is *Ex parte Virginia* (1880) 100 U.S. 339. That case was decided in an era when selection of the jury was not considered necessarily a judicial function. The Supreme Court said:

> "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge . . . that the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc."

Ex parte Virginia, 100 U.S. at 348.

On that holding, a judge was not immune from allegations of discriminatory action in excluding blacks from a jury under the Civil Rights Acts.

This principle has been carried into Ninth Circuit decisions. In *Gregory vs. Thompson* (9th Cir. 1974) 500 F.2d 59, a justice of the peace (not the defendant in this case) was sued for a Civil Rights violation under 42 U.S.C. 1983. The alleged act was the physical eviction of the plaintiff from the judge's courtroom. Absolute immunity was held not to apply. The court said at page 63:

> "When courts have spoken of immunity for acts within the jurisdiction of a judge, they have declared that the doctrine insulates judges from civil liability 'for acts committed within their *judicial* jurisdiction,' or 'for acts within [their] *judicial* role' . . . or for 'their *judicial* acts' . . . thus, judicial immunity does not automatically attach to all categories of conduct in which a judge may properly engage, but only to those acts that are of a judicial nature."
> [Emphasis in the original.]

At page 65 the court said:

> "Judge Thompson's choice to perform an act similar to that normally performed by a sheriff or bailiff should not result in his receiving absolute immunity for this act simply because he was a judge at the time."

In *Richardson vs. Koshiba* (9th Cir. 1982) 693 F.2d 911, the 9th Circuit considered and rejected the claim of absolute immunity for judges sitting on the Judicial Selection Commission of the State of Hawaii. The function of the Commission was to appoint judges, not decide cases. The court says (page 914):

> "Although the Commission describes its responsibilities in 'judicial' terms, these functions bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: The adjudication of controversies between adversaries. . . . Rather, these responsibilities indicate that the Commission's functions are executive in nature."

Thus, absolute immunity was rejected.

There is some indication in cases outside the Ninth Circuit that absolute judicial immunity may, under some circumstances, be appropriate even though the action taken is not a ruling in a judicial proceeding before the judge. For example, contrast two 7th Circuit cases: *Forrester vs. White* (7th Cir. 1986) 792 F.2d 647 and *McMillan vs. Svetanoff* (7th Cir. 1986) 793 F.2d 149. These two cases, decided within five days of each other, neatly illustrate the balancing act which must be done when looking at judicial action taken outside the context of a ruling in a particular case, where absolute immunity is asserted. In the *Forrester* case, a judge was held absolutely immune against a claim of improper discharge of a probation officer. Five days later, in the

McMillan case, a judge was held not absolutely immune from his action in the claimed improper discharge of a court reporter. Both of these actions, of course, had taken place by the judge in the exercise of administrative functions connected with his judicial office. They were, therefore, "judicial acts." However, in the *Forrester* case, the court held that absolute immunity applied because a probation officer made recommendations to a judge regarding the decision of matters before the judge. *McMillan*, five days later, distinguished Forrester because the court reporter was not directly involved in the decision-making process. Accordingly, absolute immunity was afforded in the one case and not the other.

In this case, Chief Judge Thompson's action was a judicial act. The act was administrative in the sense that it was taken to advance the safe functioning of the federal court. However, it was not an act of the character for which absolute immunity is afforded. It was an action which could have been taken by the Marshal or other security officer entrusted with that function. The Court concludes that Chief Judge Thompson's order is not of the character which is clothed with the absolute immunity afforded to judicial action taken in a judicial proceeding. Accordingly, the doctrine of absolute judicial immunity does not prevent the assertion of a damage claim against Chief Judge Thompson.

b. *Chief Judge Thompson is entitled to immunity from the damage claim by reason of qualified immunity.* The holding that absolute judicial immunity does not apply does not, however, end the discussion of the

immunity problem. On the facts of this case, Chief Judge Thompson is entitled to immunity under the doctrine of "qualified immunity." The doctrine of qualified immunity for government officials taking discretionary action has been in existence for a long time, but until recently hinged upon a factual finding of "good faith." Since "good faith," like any question of subjective state of mind, is an inherently factual issue, until recently, the defense of qualified immunity had to be tested in trial. That situation changed with *Harlow vs. Fitzgerald* (1982) 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727. In the *Harlow* case, the Supreme Court recognized as a deficiency in the practical application of the qualified immunity doctrine that every case had to go to trial. The court though this burden on necessary governmental activity too stringent. The court determined to convert the subjective test to an objective one. At page 818, the court stated:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether

> that law was clearly established at the time an action occurred."
> 73 L.Ed.2d at 410, 102 S.Ct. at 2738.

And, at page 819:

> "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and the compensation of victims remains protected by a test that focuses on the objective legal reasonableness of the official's acts."
> 73 L.Ed.2d at 411, 102 S.Ct. at 2738.

It is necessary to apply the *Harlow* standard to the facts in this case which are undisputed. First, it is to be noted, that the potential issue of fact regarding Chief Judge Thompson's motivations is not to be examined on this motion for summary judgment. What must be examined is whether the act taken was within the powers of a Chief Judge and whether there was any established law which clearly states that Chief Judge Thompson could not have taken the action that he took. The Ninth Circuit Court of Appeals in *Capoeman vs. Reed* (9th Cir. 1985) 754 F.2d 1512 has set forth its view as to how the *Harlow* case should be applied. The court said (at page 1514):

> "We conclude that in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test."

The court then proceeded to examine various cases, mostly in other circuits or in district courts, and concluded that the cases were split on the issue there in question, although the weight of the cases was in plaintiffs' favor. The court went on (at page 1515):

> "Where, as here, there are relatively few cases on point, and none of them are binding, an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue. To make this determination, we examined the legal analysis employed by those courts, and compare it to the analysis being used at that time by the Ninth Circuit in related but factually different situations. The [trial] court then made such a comparison and concluded that it was not clear at the time in question what standard the Ninth Circuit would have applied. Accordingly, immunity of the qualified variety was held applicable."

In *Backlund, et. al. vs. Barnhart* (9th Cir. 1985) 778 F.2d 1386, 1389, the court stated:

> "*Harlow, Davis* [-- U.S.-- , 82 L.Ed.2d 139 (1984) 104 S.Ct. 3012] and *Mitchell* [-- U.S. -- , 86 L.Ed.2d 411 (1986) 105 S.Ct. 2806] make it clear that, to survive summary judgment, a plaintiff must offer more than general conclusionary allegations that the

> defendant violated his First or Fourteenth Amendment rights. He must show that the defendant violated a particular 'clearly established' right; for example, his right to testify before Congress without reprisal (*Harlow*), to a hearing before being fired from the Highway Patrol (*Davis*), to freedom from warrantless wiretaps (*Mitchell*). In other words, the plaintiff must show that the *particular facts* of his case support a claim of clearly established right."

Turning to this case, plaintiff alleges in general terms that the removal of the work on security grounds violated his First Amendment rights to free speech. The issue is not that simple. It is first patently obvious that the exercise of the right of free speech in or about a courthouse is limited by the necessary use of the building as a courthouse. (See *United States vs. Grace* (1983) 461 U.S. 171, 75 L.Ed.2d 736, 103 S.Ct. 1702, interpreting 40 U.S.C. 13(k), which makes it unlawful to display political items in the Supreme Court building, held constitutional as to the building and grounds but not as to the sidewalk in front of the building.) Courthouses are not public forums (although the sidewalk in front of them may be.) The rights of free speech in a courthouse, therefore, must be considered in relativity to the needs of the functioning of the court within the courthouse and the security of that court.

Plaintiff asserts that the Chief Judge of a federal court has no business making any decisions regarding courthouse security. He cites 40 U.S.C. 285 which states in part as follows:

> "All court-houses . . . together with the site or sites thereof, are expressly declared to be under the exclusive jurisdiction and control and in custody of the Administrator of General Services . . .."

If, by citing this, plaintiff means, as he apparently does, that the federal judges, acting through their Chief Judge, have no legitimate say in courthouse security matters, this Court flatly rejects such a suggestion. GSA may have the responsibility for the protection of the courthouse as a building, but the court, usually acting through the Marshal, has a co-existent security interest in the safe functioning of the courts within that courthouse. Thus, as was said in *United States vs. Poludniak* (8th Cir. 1981) 657 F.2d 948, at 954, courthouse security is among the responsibilities of the Chief Judge. Courthouse security is provided both by the Federal Protective Service, an agency of the GSA, and by the United States Marshal, under the direction of the judges. Their functions clearly overlap. The court has, for all of its history, relied upon the Marshal, federal officers under the direction of the court, for the security not only of the judge's person and of the courtroom in which the trial is being held, but also of the courthouse in which judges must of necessity operate. Plaintiff's proposition that Chief Judge Thompson, or the judges of the Southern District, have no legitimate interest in the courthouse security is emphatically rejected.

The judges of the Southern District have adopted Local Rule 122 which reads as follows:

> "The court, or any judge, may from time to time make such orders or impose such requirements as may be reasonably necessary to assure the security of the court and of all persons in attendance."

So far as this Court is aware (the parties have cited none), there are no cases which detail precisely the functions of the Chief Judge of a federal court, or the judges of a federal court acting through the Chief Judge, in dealing with courthouse security. The Court is convinced that the judges, or the Chief Judge acting for the judges, have, as a necessary consequence of their obligation to efficiently process the administration of justice, the duty and obligation to assure that proper security measures are taken. But whether this view is right or wrong, there is no clearly established law (in qualified immunity terms) which denies it.

Turning now to the facts of this case, plaintiff complains that Chief Judge Thompson, in effect, directed the cancellation of plaintiff's permit. But Chief Judge Thompson did no such thing; he only directed removal of the perceived security hazard; GSA canceled the permit. Chief Judge Thompson acted within the confines of his interests, which was the security of the courthouse, and which does not have any particular direct relationship with the issuance and cancellation of the permit. In short, he did not direct that the permit be canceled, or take lesser actions of directing that the permit be amended in certain respects to reduce the security risk -- he directed that the risk that he saw be eliminated. Under the qualified immunity doctrine as developed in the *Harlow* case, we do not examine the state of mind of Chief Judge Thompson (although, as

noted above, he denies any intention of interfering with the expression of First Amendment rights), we look only to an objective indication of whether the order made by Chief Judge Thompson violated any established and known constitutional right. There is no such indication. A court security officer reported difficulty in performing the duties of the security officer's job because of the existence of the fence. Here, it makes no difference whether the fence was there as a result of GSA's suggestion or the artist's artistic conceptions. Further, whether other action might have been taken is not relevant if removal of the perceived security problem is a rational method of dealing with the problem, leaving other refinements until after the security problem was solved. Nor has Chief Judge Thompson directed that under different circumstances the GSA could not allow the work on courthouse or other federal property. Since "good faith," "motive," or "intention," is not to be examined in considering a summary judgment based upon a claim of qualified immunity under the *Harlow* case, it must be said there is no triable issue of fact. Chief Judge Thompson is entitled to immunity for his order to remove the work of art under the doctrine of qualified immunity. The damage action as to him must, therefore, be dismissed.

c. *This Court may not grant an injunction against Chief Judge Thompson.* Plaintiff sets forth in his complaint, and in his papers, that damages are merely sought as an alternative remedy in case injunction is not available. It is apparent that the plaintiff, in this action, seeks this Court's injunction against Chief Judge Thompson directing him to allow the work of art to be displayed in its original form in its original position. Plaintiff has cited the court no authority which allows

one federal district judge to tell another how to perform judicial duties. This Court knows of no such authority. We have seen earlier in this memorandum that the Court classifies the actions of Chief Judge Thompson as a judicial action, albeit one not taken in the context of a particular case. The Chief Judge of a federal district court has substantial administrative responsibilities which are confided to him either by law or by tradition and practice. This Court knows of no authority which would permit it to direct the Chief Judge of a federal district court as to the manner in which he must perform those duties. Direction of a federal judge's future judicial action cannot, in the opinion of this Court, be handled in another district court. (Cf. *Bergh vs. State of Washington* (9th Cir. 1976) 535 F.2d 505.) Whatever review is available in the hierarchical system of federal courts must be in either the Ninth Circuit Court of Appeals or in the Judicial Council of the Ninth Circuit, depending upon whether the action sought to be corrected is judicial or administrative. Perhaps *Chandler vs. Judicial Council of the Tenth Circuit* (1970) 398 U.S. 74, 26 L.Ed.2d 100, 90 S.Ct. 1648, *reh. den.* 399 U.S. 937, 90 S.Ct. 2248, 26 L.Ed.2d 809, hints that the Judicial Council of the Ninth Circuit may make administrative directives to a district judge. Whether this is so or not, this Court is satisfied that a federal district judge may not tell another federal district judge by injunction how that judge is to handle the duties confided to him. Accordingly, the request for injunction states no cause of action.

It is concluded, therefore, that summary judgment must be granted against the plaintiff and in favor of Chief Judge Gordon Thompson, Jr.

3. *The defendants Hamilton and Waggoner are entitled to summary judgment on immunity grounds.* In this section of this memorandum, there must be distinguished the damage and injunction claim against defendants Hamilton and Waggoner from the issues involved in the review of the administrative action of the GSA under the Administrative Procedure Act. In this section of the memorandum, the Court addresses only the *Bivens* action against Hamilton and Waggoner, as individuals.

a. Defendants Hamilton and Waggoner are not entitled to absolute immunity. No major argument is urged that Hamilton is entitled to absolute immunity. It is, however, argued that Waggoner is entitled to absolute immunity as an administrative hearing officer under the doctrine of *Butz vs. Economou* (1978) 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894. In the *Butz* case, an administrative hearing officer who performs acts "functionally comparable" to that of a judge is entitled to the same type of absolute immunity as is a judge. Immunity is afforded because (at page 514):

> "The risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women . . . persons subject to these restraints [of the Administrative Procedure Act] and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error must seek agency or judicial review."

If the regulations in this case (41 C.F.R. 101-20.705) provided for the type of hearing referred to by the Supreme Court, the doctrine of the *Butz* case would apply. But that is not the case. The regulations provide for an informal review by the superior of the deciding officer, not a due process hearing. No record is required. The issues are not required to be framed. The building manager and the grieved party have the opportunity (not necessarily in each other's presence) to orally state their reasons. "The regional officer shall affirm or reverse the buildings manager's determination based on this information." In short, the "appeal" provided for in the regulations is a mere informal administrative review without the panoply of protections envisioned by the Supreme Court in the *Butz* case. In a similar situation, the Ninth Circuit in *Bothke vs. Flour Engineers and Constructors, Inc.* (9th Cir. 1983) 713 F.2d 1405, at 1409, made clear that informal administrative review of the type specified here does not lead to *Butz*-type immunity. The Court of Appeals points out that there is no independent adjudicator in the nature of a judge, there was no transcript and exhibits as the exclusive record on which the decision is based, there were no findings and conclusions, there was no cross-examination of witnesses and the like. To which, this Court might add, there was no formal framing of issues and no presentation of witnesses, only the informal gathering of information and views by an administrator. This is not the type of administrative proceeding which will bring absolute judicial immunity.

b. *Defendants Hamilton and Waggoner are entitled to immunity under the doctrine of qualified immunity.* The qualified immunity application in the case of

Hamilton and Waggoner has some ironies. The theory of the First Amended Complaint is that a person not entitled to make determinations (Chief Judge Thompson) directed Hamilton to take certain actions, and, without warrant of law, Hamilton took the actions as directed by the judge, later affirmed on specious reasons by Waggoner. In the Court's opinion, this does not state a Bivens type of action against either Hamilton or Waggoner. If, as alleged in the complaint, Hamilton and Waggoner acted under the compulsion of an Article III judge's order, then, because there is no clearly established authority showing that they need not obey that order, they are entitled to qualified immunity. Put another way, if plaintiff's theory is, as expressed in the First Amended Complaint, that Hamilton and Waggoner were merely functionaries carrying out the orders of Chief Judge Thompson, then they should be entitled to qualified immunity unless there was clearly established legal authority saying that they had the duty not to carry out such orders. Plaintiff has cited no authority for this proposition and the Court knows of none. Accordingly, the allegations of the complaint show on their face the existence of an immunity under the qualified immunity doctrine for Hamilton and Waggoner.

There is an additional reason why Hamilton and Waggoner cannot be sued in their individual capacity. *Bivens vs. Six Unknown Federal Narcotics Agents* (1970) 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999, allowed suit against federal officers for constitutional torts of the type provided by 42 U.S.C. 1983 for suits against state officers. However, in this case both Hamilton and Waggoner acted in a legalistic manner under the regulations. Hamilton took his action to

cancel the permit, citing to the regulations. An appeal was authorized under the regulations and reviewed under the regulations by Waggoner. Both Hamilton and Waggoner appear to have followed the procedure of the regulations. There may be an issue as to whether or not they made correct determinations, but those would be reviewable under the Administrative Procedure Act. Constitutional torts, such as assault and battery or unreasonable search and seizure without warrant, as recognized in the *Bivens* case, are not available in this situation. If there is an alternative mechanism provided by law for relief, the plaintiff must follow that mechanism. *Bush vs. Lucas* (1983) 462 U.S. 367, 76 L.Ed.2d 648, 103 S.Ct. 2404; *Davis vs. Passman* (1979) 442 U.S. 228, 60 L.Ed.2d 846, 99 S.Ct. 2264. Here, with the action taken under the regulations, the remedy provided for in federal law for review of that action is available, and is sought by plaintiff in this very case. Accordingly, the *Bivens* action is not available against Waggoner and Hamilton.

Plaintiff has also sought an injunction against Waggoner and Hamilton, apparently in their individual capacity. However, since an injunction is among the remedies available against the agency for the agency action, and it is the agency action which is sought to be remedied, there is no legitimate claim for an injunction against Hamilton and Waggoner individually.

Summary judgment must be granted to Hamilton and Waggoner.

4. *Summary judgment is denied as to the General Services Administration.* Plaintiff seeks to review the action of the General Services Administration. This

review is under the Administrative Procedures Act. Plaintiff challenges the action of Hamilton in canceling his permit and of Waggoner in denying the appeal from that cancellation.

a. *Jurisdiction.* The district court has jurisdiction under 5 U.S.C. 702. The Public Buildings Cooperative Use Act, and regulations (41 C.F.R. Subpart 101-20.7 through 101-20.709 have no specific provision for court review of final agency action. Accordingly, this Court has original jurisdiction for "non-statutory" review of final GSA action under 5 U.S.C. 702. With the absence of any special statutory review provided by statute, any applicable form of legal action, including action for declaratory judgment, writ of prohibition, or mandatory injunction is available (5 U.S.C. 703). The action may be brought against the agency under its official title, as has been done here. Accordingly, this Court may review the action of the GSA in canceling the permit. The Court reviews the agency action for "abuse of discretion," including alleged abused discretion involving claims of violation of "constitutional, statutory, regulatory, or other legal mandates or restrictions . . ." (*Ness Investment Corp. vs. U.S. Department of Agriculture* (9th Cir. 1975) 512 F.2d 706, 715. *See also United States vs. Carter* (9th Cir. 1983) 704 F.2d 1063). The APA has codified much of the court-made law as to the reviewable questions, which include the lawfulness of orders on constitutional and statutory provisions, whether action is arbitrary, capricious, or an abuse of discretion, contrary to constitutional right or privilege, and whether the action followed the correct procedures. (5 U.S.C. 706.)

b. *Triable issues of fact on the administrative review exist.* The facts submitted to the Court do not warrant summary judgment in favor of the GSA on the challenge as to administrative review. In the first place, there is presented a triable issue of fact as to the ground on which the GSA in fact canceled the permit. Plaintiff in his complaint, substantiated by Chief Judge Thompson's declaration, takes the position that the permit was canceled by reason of the directive of Chief Judge Thompson. The GSA finding rendered by Mr. Waggoner, to the contrary, affirms the cancellation because the action was moot (on the ground by the time Mr. Waggoner decided the appeal, the permit had lapsed) and also on the ground that the application did not fully describe the work of art. However, it appears that even as to the latter ground, there is an issue of fact, *i.e.*, whether the fence, the object pointed to by Mr. Waggoner as not included in the application, was suggested by the GSA itself through a lower-ranking and presumably non-authorized employee, or was inserted by the artist after failure of full disclosure. Procedural problems also exist; it appears that no record was presented to Mr. Waggoner on the question of how the fence got around the art object, which may result from the circumstance that the original grounds for cancellation of the permit by Mr. Hamilton were not sufficiently set forth to allow plaintiff Avalos to present his position to Mr. Waggoner.

Lastly, the question of remedy is to be considered. It may be reasonably arguable that canceling the permit altogether was an abuse of discretion in the light of other, less severe, potential remedies which might possibly have been put in place (i.e., as possibilities and not to the exclusion of others, removal of the fence,

posting of a guard at plaintiff's expense, placing the art object on other government property with comparable public exposure but lesser security considerations, etc.). All of these are matters which might be explored on a judicial review of administrative action and which are not obviated by the existence of uncontradicted facts on this motion for summary judgment. Not to be lost in this discussion are also the First Amendment considerations so urgently advanced by plaintiff. Classic First Amendment doctrine provides that restriction on First Amendment expression must be narrowed to meet only the overriding governmental interest to be accommodated. There is room for argument here that cancellation of the permit was too broad a result if, as seems possible on this record, other narrower actions which accommodated the security needs seen by Chief Judge Thompson are feasible. Accordingly, the motion for summary judgment and to dismiss by GSA is denied.

5. *Further procedural steps.* A judgment is to be entered for the defendants Thompson, Hamilton and Waggoner. There being no just reason for delay, that judgment will be determined to be a final judgment at this point under Rule 54. This memorandum will serve as the Court's finding of uncontradicted facts and conclusions of law; no further findings and conclusions need be submitted. GSA will file its answer within twenty-one (21) days. Thereafter, a status conference will be held to determine further steps in the Administrative Procedure Act review of the GSA determination.

DATED: April 16, 1987.

/s/ Harry L. Hupp
United States District Judge